

120 FERC ¶ 61,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket Nos. EL03-180-029
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	EL03-154-023
Portland General Electric Company	EL02-114-024
Enron Power Marketing, Inc.	EL02-115-028
El Paso Electric Company Enron Power Marketing, Inc. Enron Capital and Trade Resource Corp.	EL02-113-026

OPINION NO. 497
ORDER AFFIRMING INITIAL DECISION

(Issued July 31, 2007)

1. This matter is before the Commission pursuant to its authority under Rule 712 of the Commission's Rules of Practice and Procedure to review an initial decision in the absence of exceptions, provided the Commission has issued an order staying the effectiveness of the initial decision.¹ In this opinion the Commission affirms the Initial Decision issued by the Chief Judge in the above-captioned dockets on June 1, 2007.²

¹ 18 C.F.R. § 385.712 (2007).

² *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 119 FERC ¶ 63,009 (2007) (Initial Decision). On July 10, 2007, the Commission issued an order staying the effectiveness of the Initial Decision pending Commission review. *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 120 FERC ¶ 61,030 (2007).

The Initial Decision addressed whether any persons appearing before the Commission engaged in unethical or improper conduct in connection with Enron's submission of data in Docket No. EL01-10, *et al.* sufficient to warrant disqualification pursuant to Rule 2102 of the Commission's Rules of Practice and Procedure.³ In the Initial Decision, the Chief Judge found that no violations were committed by any person in connection with the relevant data submissions. We affirm the Initial Decision for the reasons discussed below.

I. Background

2. In 2001, Judge Carmen A. Cintron presided over litigation surrounding transactions in the Pacific Northwest spot market.⁴ That proceeding addressed whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest and the extent of potential refunds.⁵ In August 2001, Judge Cintron issued orders directing parties to submit data on their transactions in the Pacific Northwest to the Commission using a specific template.⁶ Dr. Jan Paul Acton assisted counsel for Enron Power Marketing, Inc. and Enron Energy Services, Inc. (collectively, Enron) in preparing Enron's response to the 2001 Data Orders.

3. In 2007, Dr. Acton testified in Docket No. EL03-180-000, *et al.*, a docket over which Judge Cintron has been presiding.⁷ As set forth in the Joint Statement of Issues filed by counsel for Enron and Public Utility District No. 1 of Snohomish County, Washington (Snohomish) on January 23, 2007, the issues being determined in Docket No. EL03-180-000, *et al.* include: (1) whether Enron violated its market-based rate authority from January 16, 1997 to June 23, 2003; (2) whether Enron engaged in gaming or anomalous market behavior during that period; and (3) what are appropriate remedies,

³ 18 C.F.R. § 385.2102 (2007).

⁴ *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, Docket No. EL01-10-000 (Pacific Northwest proceeding).

⁵ *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120, at 61,520 (2001).

⁶ See Order on Data Submissions, August 3, 2001, Docket No. EL01-10-000 and Order on Format for Data Submissions, August 9, 2001, Docket No. EL01-10-000 (2001 Data Orders).

⁷ Judge Cintron issued an initial decision in Docket No. EL03-180-000, *et al.* on June 21, 2007. See *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 119 FERC ¶ 63,013 (2007).

if any. Under cross-examination by Snohomish's counsel, Dr. Acton provided testimony that Judge Cintron believed called into question the completeness of data Enron submitted to the Commission in the Pacific Northwest proceeding.⁸

4. In response to the suggestion that Enron may have withheld from the Commission certain data required by the 2001 Data Orders, Judge Cintron certified the following question to the Commission pursuant to Rule 714 of the Commission's Rules of Practice and Procedure:⁹

Whether a hearing should be initiated to determine if Dr. Acton, Charles River Associates (CRA), and Enron's attorneys should be suspended from appearing and practicing before the Commission?

On April 11, 2007, the Commission directed that a hearing be conducted to determine whether Dr. Acton, CRA, or the Enron attorneys (collectively, the Enron Parties) engaged in unethical or improper conduct or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders.¹⁰ The Commission referred the issues identified in its Order on Certified Question to the Chief Judge for further action in accordance with the guidelines set forth in its order.

5. The Chief Judge conducted a conference on May 14-15, 2007 to determine whether it was appropriate to dismiss from the proceedings any persons identified in connection with Enron's data submissions. This conference was conducted after the Chief Judge collected affidavits, evidence, and written views of participants, and after Trial Staff conducted a technical conference. At the May 14-15, 2007 conference, the

⁸ See March 13, 2007 Certification of Question Regarding Suspension of Witness and Attorneys Pursuant to Rule 2102, Docket No. EL03-180-000, *et al.* (Certification Order). Dr. Acton testified that Enron excluded certain data because it reflected internal Enron bookkeeping activities and was removed for the purpose of "fairly and accurately" representing Enron's trading with the outside world. Dr. Acton explained that these internal "bookkeeping" transfers were not from one Enron affiliate to another Enron affiliate; rather, they were transfers of responsibility for transactions (from one trade desk to another) within the same Enron affiliate.

⁹ *Id.*

¹⁰ *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 119 FERC ¶ 61,036 (2007) (Order on Certified Question).

Chief Judge dismissed persons who had been identified in connection with the data submissions one-by-one, based on his determination that there was a lack of evidence of improper or unethical conduct. Some persons were dismissed without providing testimony, while others were dismissed only after they had testified and been cross-examined about their connection to and conduct regarding the data submissions. By the end of the conference, the Chief Judge had dismissed all persons named in connection with the data submissions without objection.

II. Discussion

A. Initial Decision

6. In the Initial Decision, the Chief Judge found, based on the evidence submitted and the testimony provided, that seven counter-parties were screened out of the information submitted by Enron in response to the 2001 Data Orders. Trial Staff witness Poffenberger, who designed the template for the Pacific Northwest proceeding, provided testimony demonstrating that most, if not all, of the data omitted from Enron's filing was done so correctly. Poffenberger testified that the seven counter-parties were likely not included in Enron's data submission because the template detailed in the 2001 Data Orders did not contemplate: data on transactions involving entities/counter-parties outside the Pacific Northwest; data on cost-based retail transactions (i.e., transactions with entities not participating in the spot market); or data on intra-company transactions (i.e., Enron internal "bookouts" or accounting transactions). Evidence and testimony revealed that the amount of MWh sales and purchases represented by the excluded data was nominal, ranging from 0.1 to 0.6 percent of the transactions at issue in the Pacific Northwest proceeding. The Chief Judge determined that, not only did the exclusion of the seven counter-parties have an "infinitesimal dollar impact," but also that neither Dr. Acton, the CRA personnel doing the data organization and input, nor the Enron attorneys made any policy determinations concerning the deletion of the data applying to the seven counter-parties.¹¹

7. The Chief Judge concluded in the Initial Decision that there was "absolutely no evidence in this case that any person engaged in any unethical or improper professional conduct in connection with the data on Enron transactions in contravention of the involved 2001 Data Orders."¹² Further, the Chief Judge found that "the dollar amount

¹¹ Initial Decision, 119 FERC ¶ 63,009 at P 21-28.

¹² *Id.* P 29

involved [in the excluded data] was an infinitesimal less than 0.1 percent of the total Enron sales in the spot market.”¹³

8. The Chief Judge emphasized that no party or participant objected in any way to his finding that each of the individuals named in association with Enron’s data submissions should be eliminated from the proceedings. In other words, the Chief Judge explained, no party or participant indicated the belief that any named person was guilty of any unethical or improper professional conduct. Thus, the Chief Judge recommended in the Initial Decision that no action by the Commission was necessary and that the proceedings on the Commission’s April 11, 2007 Order on Certified Question regarding suspension of witnesses and attorneys be terminated.¹⁴

B. Port of Seattle Comments

9. On June 15, 2007, Port of Seattle filed comments on the Initial Decision, rather than a brief on exceptions, expressing no views on the merits of the certified question. Instead, Port of Seattle points out that though it “has previously expressed, and here expresses, no view on the merits of the question certified by Judge Cintron,” it submits its comments “in order to assure that the Commission is fully apprised of the larger context within which occurred the actions that gave rise to Judge Cintron’s Certification Order.”¹⁵ Port of Seattle alleges that facts unknown at the time of the evidentiary hearing in the Pacific Northwest proceeding reveal other instances in which false or misleading information appears to have been provided to the Commission.¹⁶

10. Port of Seattle includes the following facts, among others, in its comments:
(1) that it was unknown at the time of the Pacific Northwest proceeding that attorney Dan Watkiss “had substantial involvement in developing Enron’s response to California’s investigation of the Silver Peak incident, in which Enron’s apparent objective was to prevent the incident from becoming publicly revealed and/or made known to FERC;”¹⁷
(2) that at a meeting held on October 3, 2000, Timothy Belden briefed various persons on

¹³ *Id.*

¹⁴ *Id.* P 29-32.

¹⁵ Port of Seattle June 15, 2007 Comments at 1-2.

¹⁶ *Id.*

¹⁷ *Id.* at 15.

Enron's trading schemes, including attorneys Dan Watkiss and Gary Fergus, consultant Seabron Adamson, as well as attorneys Steve Hall and Christian Yoder; (3) that the briefing by Timothy Belden was a "critical event in the development of the Yoder/Hall Memos;"¹⁸ and (4) that, in May 2001, Gary Fergus initiated a string of emails directing that a set of accounting records called real time spreadsheets, also known as "Inc Sheets," needed to be copied.¹⁹

11. Port of Seattle argues, based on the foregoing facts, that Gary Fergus and Dan Watkiss, Enron's attorneys in the Pacific Northwest proceeding, should have known and/or were in a position to know that the answer to one of the issues being determined in the Pacific Northwest proceeding—"Did any seller exercise market power, or violate any conditions or limitations of its market based tariffs or agreements entered into under the Western Systems Power Pool Agreement?"—was affirmative. Port of Seattle attempts to establish that Dan Watkiss and Gary Fergus sponsored testimony in the Pacific Northwest proceeding contrary to their knowledge of Enron's trading practices and ability to exercise market power. Specifically, Port of Seattle points to the testimony of Enron witness Seabron Adamson, who "failed to acknowledge that marketers, such as Enron, exercised market power," and Enron witness Sam Van Vactor.²⁰

12. Finally, Port of Seattle contends that, at the hearing conducted to determine whether there was unethical or improper conduct in connection with Enron's submission of data in response to the 2001 Data Orders, the Chief Judge did not address evidence presented by Port of Seattle. Specifically, Port of Seattle states that the Chief Judge "did not address evidence suggesting, as explained in detail in the Port's Comments of

¹⁸ *Id.* at 16. The Yoder/Hall Memos—developed by Steve Hall and Christian Yoder using the Belden briefing, trader interviews, trader tapes, and document review—describe certain trading strategies used by Enron in the California wholesale energy market and discuss the California ISO's definition of, and prohibition of, "gaming" and "anomalous market behavior."

¹⁹ Port of Seattle explains that "Inc Sheets" were accounting documents used by traders in Portland to keep track of a variety of illegal market manipulation schemes. *Id.* at 17.

²⁰ *Id.* at 18-20.

April 30, 2007, that two of the three footnotes in the letter, written by Dan Watkiss, submitting Enron's Data Template to Judge Cintron appear to be misleading."²¹

C. Commission Determination

13. The Commission will affirm the Initial Decision. We find that the Chief Judge conducted comprehensive hearing procedures that afforded a full and fair inquiry into whether any unethical or improper professional conduct occurred in connection with the data Enron submitted to the Commission in response to the 2001 Data Orders. Based on the evidence and testimony submitted, and considering that no objections were raised to the Chief Judge's decision to dismiss all named persons from these proceedings, and that no briefs on exceptions were filed, we agree with the conclusions reached in the Initial Decision and will terminate the above-captioned proceedings.

14. As stated in our July 10, 2007 Order Staying Effectiveness of Initial Decision, the Commission does not interpret the issues raised by Port of Seattle as exceptions to the Initial Decision,²² but we will take this opportunity to address Port of Seattle's comments. First, we note that Port of Seattle has not complied with Commission rules and procedures for responding to the Initial Decision,²³ and as such, our discussion of any issue raised in Port of Seattle's comments is purely discretionary. Port of Seattle should follow Commission rules and procedures in future submissions.

15. We note that in this proceeding, Port of Seattle filed comments on April 30, 2007, and supplemental exhibits POS-1 through POS-27 on May 21, 2007. We also note that at the May 14-15, 2007 conference established by the Chief Judge to determine whether it was appropriate to dismiss from the proceedings any persons identified in connection with Enron's data submissions, Port of Seattle was able to cross-examine Dan Watkiss and Gary Fergus about the documents and events referenced in Port of Seattle's comments and supplemental exhibits. The Chief Judge dismissed both Mr. Watkiss and Mr. Fergus from the proceedings without any objection raised by Port of Seattle, or any

²¹ *Id.* at 20-21. Port of Seattle invites the Commission's attention "to pages 15-34 of the Confidential version of the Port's Comments of April 30, 2007 for a discussion of these footnotes." *Id.* n.71.

²² *See Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 120 FERC ¶ 61,030 (2007).

²³ *See* Rule 711 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711 (2007).

other party. Further, in the Initial Decision, the Chief Judge found that Port of Seattle's exhibits were not relevant to the sole issue before him in these proceedings; i.e., whether the Enron Parties engaged in unethical or improper conduct in submitting, or failing to submit, information in response to the 2001 Data Orders.

16. We find that Port of Seattle raises issues in its comments on the Initial Decision that, like its previous comments and exhibits, are beyond the narrow scope of this proceeding. In the Order on Certified Question, the Commission found that "the allegation that persons may have withheld materially significant data on Enron transactions in contravention of the 2001 Data Orders is a serious charge that warrants further consideration."²⁴ Thus, the Commission ordered hearing procedures intended to determine whether any person engaged in unethical or improper conduct in violation of Commission rules, or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders.²⁵

17. The issues presented by Port of Seattle have already been raised in the context of the larger EL03-180-000, *et al.* proceeding, which is still pending before the Commission. The prepared direct testimony of Carl Pechman, PhD., which contains almost all the facts and allegations Port of Seattle apprises the Commission of in its comments on the Initial Decision,²⁶ was submitted to the Commission by Snohomish on February 27, 2004 as Exhibit No. SNO-11 in the EL03-180-000, *et al.* proceeding, and re-submitted by Snohomish as recently as February 9, 2007.²⁷ Snohomish also listed Dr. Pechman's prepared testimony, Ex. SNO-11, in the Joint Statement of Issues for Docket No. EL03-180-000, *et al.* as an exhibit in support of its position on each of the five issues addressed in that proceeding.²⁸ Port of Seattle, an intervenor in the EL03-180-000, *et al.* proceeding, has simply re-submitted Ex. SNO-11 in this proceeding as

²⁴ Order on Certified Question, 119 FERC ¶ 61,036, at P 15.

²⁵ *Id.* P 19.

²⁶ Dr. Pechman's testimony contains all facts and allegations raised in this proceeding by Port of Seattle, with the exception of Port of Seattle's allegation that "two of the three footnotes in the letter, written by Dan Watkiss, submitting Enron's Data Template to Judge Cintron appear to be misleading." *See supra* P 10 and n.19.

²⁷ *See* Ex. SNO-11 at 50-59.

²⁸ *See* Enron-Snohomish January 23, 2007 Joint Statement of Issues, Docket No. EL03-180-000, *et al.*

Exhibit No. POS-8. The larger, still-pending EL03-180-000, *et al.* proceeding is the appropriate forum for consideration of these allegations.

18. Finally, we address Port of Seattle's allegation that two footnotes in the transmittal letter accompanying Enron's data submissions appear to be misleading. The footnotes in question state, in effect, that Enron lacks or has been unable to identify information regarding certain transactions that are included in Enron's data submission. Port of Seattle directs the Commission "to pages 15-34 of the Confidential version of the Port's Comments of April 30, 2007 for a discussion of these footnotes."²⁹ Port of Seattle supports its claim that the footnotes appear to be "incorrect"³⁰ with evidence suggesting that, because Enron attorneys and consultants were in possession of a set of transaction spreadsheets, Enron should not have included footnotes in its data submission indicating a lack of knowledge regarding various transactions. We recognize that the information called for in the 2001 Data Orders represents an enormous amount of transactional information that needed to be processed in a short time period.³¹ The Commission does not find it surprising, given the amount of data involved, that Enron included footnotes stating that it was uncertain of or unable to locate certain data or information at the time of its submission. Thus, upon reviewing the confidential information provided by Port of Seattle, we do not find any improper or unethical conduct on the part of the Enron Parties in submitting to the Commission the footnotes in question.

19. We note that, if Port of Seattle indeed considered the submission of these footnotes to be evidence of improper or unethical conduct on the part of any of the Enron Parties, Port of Seattle should have taken advantage of the procedures available to contest the findings of the Initial Decision. Those procedures include objecting to the Chief Judge's dismissal of specific named individuals at the May 14-15, 2007 conference in these proceedings and filing a brief on exception to the Initial Decision specifically challenging the Chief Judge's findings. Port of Seattle did neither.

²⁹ Port of Seattle Comments at n.71.

³⁰ *See* Port of Seattle April 30, 2007 Confidential Comments at 25-26.

³¹ *See, e.g.*, 2001 Data Orders and May 14-15, 2007 Conference Tr. at 177-188, 209-213.

The Commission orders:

The findings and conclusions of the Initial Decision are hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.